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Supreme Court of the United States,

OCTOBER TERM, 1903.

No. 239.

THE SUN PRINTING AND PUBLISHING ASSOCIATION,
Plaintiff in Error,

AGAINST

CHARLES WILLIAM EDWARDS,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

This case comes here on a certificate from the United States Circuit Court of Appeals for the Second Circuit, certifying to the Supreme Court for its determination the following question:

"Had the Circuit Court jurisdiction of the controversy between plaintiff and defendant?"

See *Certificate*, p. 2, fol. 3.

The only record before this Court is that contained in the printed Certificate, which contains the following statement:

"This cause comes here (the United States Circuit Court of Appeals, Second Circuit) upon a writ of error to review a judgment of the Circuit Court, Southern District of New York, entered upon the verdict of a jury in favor of defendant in error who was plain-

tiff below. Upon examination of the record it appears that, in addition to various questions as to the merits of the controversy which are presented by the assignments of error, the jurisdiction of the Circuit Court is in issue. * * *

Statement of Facts.

The facts out of which the question of jurisdiction arises are as follows:

The action is for breach of contract of employment. The complaint avers and the answer admits that defendant is a domestic corporation duly organized and existing under the laws of New York, having its principal office for the transaction of business in the Southern District of New York. The complaint further avers and the answer admits that 'plaintiff is a resident of the State of Delaware.' Upon the trial the plaintiff testified: 'I started in the printing business about thirty years ago. * * * I have been on the *New York Tribune*, on the *World*, the *Philadelphia Record* and the American Press Association. * * * I had charge of the *Morning News*, Wilmington, Delaware. * * * In this city (New York) I worked on the *New York Tribune*, on the *Sun*, on the *World*, and in the American Press Association. * * * Just prior to my going to work upon the *New York Sun* (under the contract in suit) I was the publisher and business manager of the *Evening Journal* of Wilmington, Delaware, and president of the company. * * * (After my discharge from the employ of the *Sun*) I finally secured a place with the *New Haven Palladium*, and I was there a while. * * * One of the reasons I left the *New Haven Palladium* was it was too far away from home. I lived in Delaware and I had to go back and forth. My family were over in Delaware.'

There was no other testimony in any way bearing upon plaintiff's residence or citizenship.

The jurisdiction of the Circuit Court was not questioned by defendant in the Court below, and the assignments of error do not present any such question."

Certificate, pp. 1 and 2, fols. 2 and 3.

The Circuit Court of Appeals has elected to reserve judgment upon the other questions and to certify the question of jurisdiction to the Supreme Court, stating that it does so in accordance with the practice indicated in *Cincinnati, Hamilton & D. Co.* v. *Thiebaud*, 177 U. S., 615, and *Am. Sugar Co.* v. *New Orleans*, 181 U. S., 277, and followed by the United States Circuit Court of Appeals in *United States* v. *Lee Yen Tai*, 113 F. R., 465.

In *American Sugar Refining Co.* v. *New Orleans*, reported in 181 U. S., at page 282, the Supreme Court in its opinion, by Mr. Chief Justice Fuller, said:

"Undoubtedly where the jurisdiction of the Circuit Court depends solely on diverse citizenship and it turns out that the case involves the construction or application of the Constitution of the United States; or the constitutionality of a law of the United States or the validity or construction of a treaty is drawn in question; or the constitution or law of a State is claimed to be in contravention of the Constitution of the United States; the Circuit Court of Appeals may certify the constitutional or treaty question to this Court, and proceed as thereupon advised; or may decide the whole case; but language should not have been used susceptible of the meaning that in cases where the jurisdiction below is invoked on the ground of diverse citizenship the Circuit Court of Appeals might decline to take jurisdiction, or, in other words, might dismiss the appeal or writ of error for want of jurisdiction."

First Point.

The only ground of jurisdiction in the Circuit Court is the assumed diverse citizenship of the parties.

The certificate shows that the case did not arise under the Constitution or laws or treaties of the United States.

The certificate states:

"The action is for breach of contract of employment. The complaint avers and the answer admits that defendant is a domestic corporation duly organized and existing under the laws of New York, having its principal office for the transaction of business in the Southern District of New York. The complaint further avers and the answer admits that 'plaintiff is a resident of the State of Delaware.'"

And then, after quoting from the plaintiff's testimony, the Circuit Court of Appeals says:

"There was no other testimony in any way bearing upon plaintiff's residence or citizenship."

Certificate, pp. 1-2, fols. 2-3.

Second Point.

The complaint contains no averment that the plaintiff, Charles William Edwards, is a citizen of the State of Delaware, and its simple averment that "plaintiff is a resident of the State of Delaware" is insufficient to give the Circuit Court jurisdiction.

"Citizenship" and "residence" are not synonymous terms.

Opinionof the Supreme Court by Mr. Justice Grier in

Parker et al. v. *Overman*, 18 Howard p. 141, December, 1855.

"Citizenship and residence, as often declared by this Court, are not synonymous terms. (*Parker et al. Overman*, 18 How., 137)."

Robertson v. *Cease*, 97 U. S., p. 648, October, 1878.

That there must be an explicit averment of citizenship has been the settled law ever since 1798, when this Court decided the case of *Bingham* v. *Cabot*, 3 Dallas, 382.

There the reporter says:

"This action came again before the Court, on a writ of error; and an objection was taken to the record, that it was not stated, and did not appear in any part of the process and pleadings, that the plaintiffs below, and the defendant, were citizens of different States, so as to give jurisdiction to the Federal Court. * * *

Lee, Attorney-General, contended for the plaintiff in error, 'that there was not a sufficient allegation on the record, of the citizenship of the parties, to sustain the jurisdiction of the Circuit Court, which is a limited jurisdiction. Though the Constitution declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens of the several States" (Art. 4, f. 2), it contemplates, in the judicial article, the distinction between citizens of different States. * * *

In the present case, neither the plaintiffs, generally, nor any individual of them, nor the defendants will be found expressly designated as aliens, or as citizens of any other place, or State, than that in which the suit was brought. * * *

The Court were clearly of opinion that it was necessary to set forth the citizenship (or alienage, where a foreigner was concerned) of the respective parties, in order to bring the case within the jurisdiction of the Circuit Court; and that the record, in the present case, was in that respect defective."

In 1803 in the case of *Abercrombie* v. *Dupuis and another*, 1 Cranch, 343

"It was assigned for error that the Circuit Court had not jurisdiction of the cause, because it does not appear upon the record that either of the parties is an alien, nor that the parties are *citizens* of different States. And for this error the judgment was reversed without argument.

The Court said that the question had been decided, after full argument, in the case of *Bingham* v. *Cabot*, 3 Dall., 383, and they did not think proper to overrule that case."

In *Wood* v. *Wagnon* (February Term, 1804), 2 Cranch, 9:

"The judgment was reversed, because it did not appear upon the record that the Circuit Court had jurisdiction of the case.

The proceedings stated, that 'the petition of John Peter Wagnon, *a citizen of the State of Pennsylvania*, showeth,

'That James Wood, *of the State of Georgia*,' &c.

The objection taken was, that it did not appear that the plaintiff and defendant were citizens of different States, and on that ground the judgment was reversed, upon the authority of *Bingham* v. *Cabot et al.*, 3 Dall., 382."

In *Capron* v. *Van Noorden*, 2 Cranch, 126, the judgment was reversed, because the declaration did not state the citizenship or the alienage of the plaintiff in the Circuit Court.

The foregoing decisions were all cited by Mr. Chief Justice Marshall, in delivering the opinion of this Court, in *Brown* v. *Keene* (January Term, 1834), 8 Peters, 112, where he said:

"The same principle has been constantly recognized in this Court."

And where, in an earlier part of the opinion, he said:

"The decisions of this Court require, that the averment of jurisdiction shall be positive, that the declaration shall state expressly the fact on which jurisdiction depends. *It is not sufficient that jurisdiction may be inferred argumentatively from its averments.*"

Idem, p. 115.

The essential jurisdictional fact should be averred or alleged in the bill of complaint.

In *Hornthall* v. *The Collector* (December, 1869), 9 Wallace, 560, Mr. Justice Clifford, in delivering the opinion of the Court, said:

"Citizenship of the parties to a suit, where it is the foundation of jurisdiction in the Federal courts,

must be distinctly averred, so as to show not only that they are citizens of different States but also that one of them is a citizen of the State where the suit is brought. Express allegation of the facts material to give jurisdiction is necessary, because such courts are courts of special and not of general jurisdiction, and consequently there is no presumption in favor of their jurisdiction where the facts requisite to show it do not appear in the record."

Idem, p. 565.

There is no presumption in favor of jurisdiction in the Circuit Court, but the presumption is against jurisdiction. This is shown by the case of *Robertson* v. *Cease*, 97 U. S., 646, where Mr. Justice Harlan, in delivering the opinion of the Court, said:

"As the jurisdiction of the Circuit Court is limited in the sense that it has none except that conferred by the Constitution and laws of the United States, *the presumption now*, as well as before the adoption of the Fourteenth Amendment, *is, that a cause is without its jurisdiction unless the contrary affirmatively appears.*"

Idem, p. 649.

This Court, in its opinion by Mr. Justice Harlan, in *Grace* v. *American Central Insurance Company*, 109 U. S., at page 283, said:

"As the jurisdiction of the Circuit Court is limited, in the sense that it has no other jurisdiction than that conferred by the Constitution and laws of the United States, the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears (*Turner* v. *Bank of North America*, 4 Dall., 8; *Ex Parte Smith*, 94 U. S., 455; *Robertson* v. *Cease*, 97 U. S., 646).

"In cases of which the Circuit Courts may take cognizance only by reason of the citizenship of the parties, this Court, as its decisions indicate, has, except under special circumstances, declined to express any opinion upon the merits on appeal or writ of error, where the record does not affirmatively show jurisdiction in the Court below; this, because the courts of the Union, being courts of limited jurisdiction, the presumption, in every stage of the

cause, is, that it is without their jurisdiction unless the contrary appears from the record (*Grace* vs. *American Insurance Co.*, 109 U. S., 278, 283; *Robertson* vs. *Cease*, 97 U. S., 646 (648)."

Börs vs. *Preston*, 111 U. S., p. 255.

In the case of *Everhart* v. *Huntsville College*, 120 U. S., 223 (decided January 31, 1887), the headnotes read:

" *An averment that the complainant in a bill of equity 'resides' in a State, is not an averment that he is a citizen of the State, so as to give a Circuit Court of the United States jurisdiction over the subject matter by reason of citizenship of the parties.*"

" When the jurisdiction of a Circuit Court depends upon the citizenship of the parties, and that court takes jurisdiction and renders judgment, and the record in this court in error or on appeal fails to show the requisite citizenship, the judgment will be reversed and the case remanded by this Court on its own motion, and the party in default adjudged to pay costs here."

There Mr. Chief Justice Waite, in delivering the opinion of the Court, said:

"On looking into the record we find no sufficient evidence of the jurisdiction of the Circuit Court, which depends alone on the citizenship of the parties. It is stated in the original bill that Everhart is a resident of Wisconsin, and the same fact is also shown by the testimony, but this, as it has often been held, is not enough. *An averment of residence is not the equivalent of an averment of citizenship for the purposes of jurisdiction in the courts of the United States.* According to the pleadings the Huntsville Female Academy is an Alabama corporation, and the other defendants are residents of either Alabama or Tennessee. The decree dismissing both the original and cross bills is reversed, because the record fails to show the jurisdiction of the Circuit Court, but as the fault rests alone on Everhart, the complainant in the original bill, whose duty it was

to put on record the facts necessary to show the jurisdiction, the reversal will be at his costs in this court. This whole subject has already been considered twice during the present term; once in *Continental Ins. Co.* vs. *Rhoads*, 119 U. S., 237, and again in *Peper* v. *Fordyce*, 119 U. S., 469. The reasons for our judgment sufficiently appear in the opinions delivered in those cases."

Idem, p. 224.

In *Menard* v. *Goggan* (decided April 11th, 1887), 121 U. S., 253, the head note reads:

"It is again held that when the jurisdiction of a Circuit Court depends alone on citizenship, an averment that the plaintiff is a 'resident' in one State named, and that the defendant is a 'resident' in another State named, confers no jurisdiction; and a judgment rendered below in such case in favor of the defendant, and brought up in error by the plaintiff, is reversed with costs in this court against the plaintiff in error."

In *Denny* v. *Pironi*, 141 U. S., at p. 123, (May 25, 1891), Mr. Justice Brown, in delivering the opinion of the Court, said:

"That an averment of residence is not the equivalent of an averment of citizenship, and is insufficient to give the Circuit Court jurisdiction, has been settled in a multitude of cases in this Court: *Parker* v. *Overman*, 18 How., 137; *Robertson* v. *Cease*, 97 U. S., 646; *Everhart* v. *Huntsville College*, 120 U. S., 223; *Menard* v. *Goggan*, 121 U. S., 253; and in case of a defective averment in this particular the judgment will be reversed by this Court upon its own motion, and the case remanded; *Peper* v. *Fordyce*, 119 U. S., 469; *Everhart* v. *Huntsville College*, 120 U. S., 223; *Menard* v. *Goggan*, 121 U. S., 253."

Third Point.

The record fails to disclose diverse citizenship in the parties.

The general rule is well stated in *Ex parte Smith* (October, 1876), 94 U. S., 455, where the head note reads:

"There are no presumptions in favor of the jurisdiction of the courts of the United States; but the facts upon which it rests must, in some form, appear in the record of all suits prosecuted before them."

The defect in the averment of the complaint was not cured at the trial, for the plaintiff did not testify as to his citizenship. His testimony as quoted in the Certificate, page 1, reads as follows:

"I started in the printing business about thirty years ago. * * * I have been on the *New York Tribune*, on the *World*, the *Philadelphia Record* and the American Press Association. * * * I had charge of the *Morning News*, Wilmington, Delaware. * * * In this city (New York) I worked on the *New York Tribune*, on the *Sun*, on the *World*, and in the American Press Association. * * * Just prior to my going to work upon the *New York Sun* (under the contract in suit) I was the publisher and business manager of the *Evening Journal* of Wilmington, Delaware, and president of the company. * * * (After my discharge from the employ of the *Sun*) I finally secured a place with the *New Haven Palladium*, and I was there a while. * * * One of the reasons I left the *New Haven Palladium* was it was too far away from home. I lived in Delaware and I had to go back and forth. My family were over in Delaware."

This testimony throws no light, whatsoever, upon the citizenship of the plaintiff. It merely shows that he had worked on New York newspapers, on a Philadelphia newspaper, on a Delaware news-

paper, and, after his discharge from the employ of the *Sun*, on the *New Haven Palladium*, and that when he left the *New Haven Palladium*, he lived in Delaware and had to go back and forth, and that his family were over in Delaware. So, the plaintiff may well have been at the time of the commencement of the action a citizen of the State of New York, for he says, "in this City (New York), I worked on the *New York Tribune*, on the *Sun*, on the *World* and in the American Press Association." That his family lived in Delaware, and that he, the plaintiff, lived in Delaware, furnishes no proof that plaintiff was a citizen of that State.

In *Grace* vs. *American Central Insurance Co.*, decided November 19, 1883, 109 U. S., 278, the third and fourth headnotes read:

"3. The doctrine reaffirmed, that when jurisdiction of the circuit court depends upon the citizenship of the parties, such citizenship, or the facts which in legal intendment constitute it, must be distinctly and positively averred in the pleadings, or appear affirmatively and with equal distinctness in other parts of the record. An averment that parties reside, or that a firm does business, in a particular State, or that a firm is 'of' that State, is not sufficient to show citizenship in such State.

4. Where the record does not show a case within the jurisdiction of a circuit court, this court will take notice of that fact, although no question as to jurisdiction had been raised by the parties."

In that case Mr. Justice Harlan, in delivering the opinion of the Court, said:

"*The record in this case presents a question of jurisdiction which, although not raised by either party in the court below or in this court, we do not feel at liberty to pass without notice* (*Sullivan* v. *Fulton Steamboat Co.*, 6 Wheat., 450; *Jackson* v. *Ashton*, 8 Pet., 148). As the jurisdiction of the circuit court is limited, in the sense that it has no other jurisdiction than that conferred by the Constitution and laws of the United States, the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears (*Turner* v. *Bank*

of North America, 4 Dall., 8; *Ex Parte Smith*, 94 U. S., 455; *Robertson* v. *Cease*, 97 U. S., 646). In the last case it is said that 'where jurisdiction depends upon the citizenship of the parties, such citizenship, or the facts which in legal intendment constitute it, should be distinctly and positively averred in the pleadings, or they should appear affirmatively and with equal distinctness in other parts of the record' (*Railway Co.* v. *Ramsay*, 22 Wall., 322; *Briges* v. *Sperry*, 95 U. S., 401). In *Brown* v. *Keene*, 8 Pet., 112, it is declared not to be sufficient that jurisdiction may be inferred argumentatively from averments in the pleadings; that the averments should be positive.

* * * * * *

The record does not satisfactorily show the citizenship of the parties. The complaint filed in the State court shows that the firm of Wm. R. Grace & Co., composed of Wm. R. Grace, Michael P. Grace, and Charles R. Flint, is doing business in New York, and that Wm. R. Grace and Charles R. Flint are residents of that State. The petition for the removal of the cause shows that the defendant is a corporation of the State of Missouri; that Wm. R. Grace and Charles R. Flint reside in New York; and that Michael P. Grace is a resident of some State or country unknown to defendant, but other than the State of Missouri. The record, however, fails to show of what State the plaintiffs are citizens. *They may be doing business in and have a residence in New York, without necessarily being citizens of that State.* They are not shown to be citizens of some State other than Missouri."

Idem, pp. 283-284.

The record must show affirmatively and with distinctness that at the time of the commencement of the action a diversity of citizenship existed.

"We are of opinion that the inquiry is to be determined as of the date when the suit is commenced. Jurisdiction vests then and cannot be divested by subsequent change of residence; but jurisdiction cannot be held to have vested prior to action brought. There have been many decisions to this effect, the same question being presented under all the acts from 1789."

Opinion of the Supreme Court by Mr. Chief Justice Fuller in *Emshcimer* v. *New Orleans*, 186 U. S., at p. 44.

See also *Gibson* v. *Bruce*, 108 U. S., 561.

In *Continental Insurance Company* v. *Rhoads* (decided November 29, 1886), 119 U. S., 237, Mr. Chief Justice Waite, in delivering the opinion of the Court, said:

"One of the errors assigned on this record is that the circuit court had no jurisdiction. It was settled at a very early day that the facts on which the jurisdiction of the circuit courts rest must, in some form, appear on the face of the record of all suits prosecuted before them (*Turner* v. *Bank of North America*, 4 Dall., 8; *Bushnell* v. *Kennedy*, 9 Wall., 387; *Hornthall* v. *Collector*, 9 Wall., 560; *Ex parte Smith*, 94 U. S., 455; *Robertson* v. *Cease*, 97 U. S., 646; *Grace* v. *American Central Ins. Co.*, 109 U. S., 278, 283; *Börs* v. *Preston*, 111 U. S., 252, 255; *Mansfield, Coldwater and Lake Michigan Railway* v. *Swan*, 111 U. S., 379, 382; *Hancock* v. *Holbrook*, 112 U. S., 229). And it is error for a court to proceed without its jurisdiction is shown (*Grace* v. *American Central Insurance Co.*, *supra*; *Thayer* v. *Life Association*, 112 U. S., 717; *Mansfield*, &c., *Railway* v. *Swan*, *supra*).

It is conceded that the jurisdiction in this case depends alone on the citizenship of the parties, and that there is not in the declaration any averment in express terms of the citizenship of the plaintiff.

It does appear that the defendant was, at the commencement of the suit, a citizen of Connecticut, and that the intestate, Maris Rhoads, was at the time of his death a citizen of Pennsylvania, but there is nothing to show the citizenship of the plaintiff, and the jurisdiction depends on her citizenship, and not on that of her intestate. *Amory* v. *Amory*, 95 U. S., 186. It is true that the record does show that letters of administration were granted to her in Pennsylvania, but that does not make her a citizen of that State. It may be that by the law of Pennsylvania the personal representative of a deceased citizen of Pennsylvania is, in contemplation of law, resident within the State,

and at all times amenable to the jurisdiction of the proper courts of that State, but that does not necessarily imply citizenship of the State. He must be there for the purposes of his administration, but that is all.

And, besides, the jurisdiction must appear positively. It is not enough that it may be inferred argumentatively (*Brown* v. *Keene*, 8 Pet., 112; *Robertson* v. *Cease*, *supra*). If the plaintiff was actually a citizen of Pennsylvania when the suit was begun, the record cannot be amended here so as to show that fact, but the Court below may, in its discretion, allow it to be done when the case gets back. *Morgan* v. *Gay*, 19 Wall., 81; *Robertson* v. *Cease*, *supra*."

Idem., pp. 239–240.

In the case of *Peper* v. *Fordyce*, 119 U. S., page 471, it was held that "*if the jurisdiction does not appear on the face of the record in some form, the decree is erroneous and must be reversed.*"

Here, there is not only an absence of any averment that the plaintiff below, Edwards, is a citizen of Delaware but this fact, on which jurisdiction depends, does not appear on the face of the record, and it cannot be inferred argumentatively—as we note was decided in the *Continental Insurance Co.* v. *Rhoads*.

In *Thayer* v. *Life Association*, 112 U. S., 717, it was held that since the trustee was an indispensable party, his citizenship was material in determining the jurisdiction of the Circuit Court; and as that was not averred and did not otherwise affirmatively appear to be such as gave the right of removal, the decree must be reversed.

It is error for the Circuit Court to proceed, unless its jurisdiction be shown.

In *Mansfield, Coldwater & Lake Michigan Railway Company* v. *Swan*, 111 U. S., 379, Mr. Justice Matthews, in delivering the opinion of the Supreme Court of the United States, said:

"According to the decision in *Gibson* v. *Bruce*, 108 U. S., 561, the difference of citizenship on

which the right of removal depends must have existed at the time when the suit was begun, as well as at the time of the removal. And according to the uniform decisions of this Court, the jurisdiction of the Circuit Court fails, unless the necessary citizenship affirmatively appears in the pleadings or elsewhere in the record (*Grace* v. *American Central Insurance Company*, 109 U. S., 278, 283; *Robertson* v. *Cease*, 97 U. S., 646). It was error, therefore, in the Circuit Court to assume jurisdiction in the case, and not to remand it on the motion of the plaintiffs below."

Idem, pp. 381-382.

In *Horne* v. *George H. Hammond Company*, 155 U. S., 393, in rendering the opinion of the Court, Mr. Chief Justice Fuller said:

"As the transcript of the record does not show that the Circuit Court had jurisdiction of the suit, which depended upon the citizenship of the parties, and as counsel, upon having their attention called to the matter, have furnished nothing of record which would supply the defect, the judgment must be reversed at the costs of plaintiff in error, and the cause be remanded to the Circuit Court for further proceedings (*Robertson* v. *Cease*, 97 U. S., 646, 649; *Anderson* v. *Watt*, 138 U. S., 694, 702; *Timmons* v. *Elyton Land Co.*, 139 U. S., 378; *Denny* v. *Pironi*, 141 U. S., 121."

In the case of *Interior Construction and Improvement Company* vs. *Gibney*, 160 U. S., p. 219, Mr. Justice Gray, in rendering the opinion of the Court, said:

"The Circuit Courts of the United States are thus vested with general jurisdiction of civil actions, involving the requisite pecuiary value, between citizens of different States. Diversity of citizenship is a condition of jurisdiction, and, when that does not appear upon the record, the Court, of its own motion, will order the action to be dismissed."

Idem, pp. 239-240.

Fourth Point.

A party cannot, by proceedings in the Circuit Court, waive a question of jurisdiction in that Court, so as to prevent its being raised and passed upon by the Supreme Court of the United States.

In *Mansfield, Coldwater & Lake Michigan Railway Company* v. *Swan* (decided April 21st, 1884), 111 U. S., 379, the third head note reads—

"It is an inflexible rule that the judicial power of the United States must not be exerted in a case to which it does not extend, even if both parties desire to have it exerted. The language of Mr. Justice Curtis in *Dred Scott Case*, 19 How., 566, cited and adopted."

In rendering the opinion of the Court, Mr. Justice Matthews said:

"It is true that the plaintiffs below, against whose objection the error was committed, do not complain of being prejudiced by it; and it seems to be an anomaly and a hardship that the party at whose instance it was committed should be permitted to derive an advantage from it; but the rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction. and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it. This rule was adopted in *Capron* v. *Van Noorden*, 2 Cranch, 126, decided in 1804, where a judgment was reversed, on the application of the party against

whom it had been rendered in the Circuit Court, for want of the allegation of his own citizenship, which he ought to have made to establish the jurisdiction which he had invoked. This case was cited with approval by Chief Justice Marshall in *Brown* v. *Keene*, 8 Pet., 112.

* * * * * *

"The true question is, not what either of the parties may be allowed to do, but whether this court will affirm or reverse a judgment of the Circuit Court on the merits, when it appears on the record, by a plea to the jurisdiction, that it is a case ot which the judicial power of the United States does not extend. The course of the court is, where no motion is made by either party, on its own motion, to reverse such a judgment for want of jurisdiction, not only in cases where it is shown negatively, by a plea to the jurisdiction, that jurisdiction does not exist, but even when it does not appear affirmatively that it does exist (*Pequignot* v. *The Pennsylvania Railroad Company, 16 How., 104*). It acts upon the principle that the judicial power of the United States must not be exerted in a case to which it does not extend, even if both parties desire to have it exerted (*Cutler* v. *Rae*, 7 How., 729). I consider, therefore, that when there was a plea to the jurisdiction of the Circuit Court in a case brought here by a writ of error, the first duty of this Court is, *sua sponte*, if not moved to it by either party, to examine the sufficiency of that plea, and thus to take care that neither the Circuit Court nor this court shall use the judicial power of the United States in a case to which the Constitution and laws of the United States have not extended that power."

"This is precisely applicable to the present case, for the motion of the plaintiffs below to remand the cause was equivalent to a special plea to the jurisdiction of the court; but the doctrine applies equally in every case where the jurisdiction does not appear from the record."

Idem., pp. 382 and 384.

In *Metcalf* v. *Watertown*, decided December 10, 1888, 128 U. S., at p. 589, Mr. Justice Harlan, in rendering the opinion of the Court, said:

"Where, however, the original jurisdiction of a Circuit Court of the United States is invoked upon

the sole ground that the determination of the suit depends upon some question of a Federal nature, it must appear, at the outset, from the declaration or the bill of the party suing, that the suit is of that character; in other words, it must appear, in that class of cases, that the suit was one of which the Circuit Court, at the time its jurisdiction is invoked, could properly take cognizance. If it does not so appear, then the Court, upon demurrer or motion, or upon its own inspection of the pleading, must dismiss the suit; just as it would remand to the State court a suit which the record, at the time of removal, failed to show was within the jurisdiction of the Circuit Court. It cannot retain it in order to see whether the defendant may not raise some question of a Federal nature upon which the right of recovery will finally depend; and if so retained, the want of jurisdiction, at the commencement of the suit, is not cured by an answer or plea which may suggest a question of that kind. *If the City had not answered in the present suit, and judgment by default had been rendered against it, this Court, upon writ of error, would have been compelled to reverse the judgment, upon the ground that the record did not show jurisdiction in the Circuit Court.*"

In *Parker* v. *Omsby*, 141 U. S., 81, the second head note reads:

"A party cannot, by proceedings in the Circuit Court, waive a question of the jurisdiction of that court, so as to prevent its being raised and passed upon here."

Mr. Justice Harlan, in delivering the opinion of the Court, said:

"Did the Court below have jurisdiction of this case? If jurisdiction did not affirmatively appear upon the record, it was error to have rendered a decree, *whether the question of jurisdiction was raised or not in the Court below.* In the exercise of its power, this Court, of its own motion, must deny the jurisdiction of the Courts of the United States, in all cases coming before it, upon writ of error or appeal, where such jurisdiction does not affirmatively appear in the record on which it is called to act (*Mansfield, &c., Railway Co.* v. *Swan*, 111 U. S.,

879, 382; *King Bridge Co.* v. *Otoe County*, 120 U. S., 225, 226; *Cameron* v. *Hodges*, 127 U. S., 322, 325.

* * * * * *

The motion to dismiss the appeal necessarily assumes that it was competent for the appellants by their acts, or by failing to act, to waive the question of the jurisdiction of the Circuit Court. This is an error. We said in *Metcalf* v. *Watertown*, above cited, that whether a Circuit Court of the United States had or had not jurisdiction in a case brought here, upon error or appeal, is a question that this Court must examine and determine, even if the parties forbear to make, or consent that the case be considered upon its merits."

Idem, pp. 83 and 86.

Fifth Point.

The costs should be imposed upon the plaintiff in the Circuit Court, the defendant-in-error, Charles William Edwards, because the fault rests alone on the plaintiff, whose duty it was, in bringing the suit, to make the jurisdiction appear.

In *Halsted* v. *Buster*, 119 U. S., at page 342, Mr. Chief Justice Waite, in delivering the opinion of the Court, said:

"This record does not show that the Circuit Court had jurisdiction of the suit, which depends alone on the citizenship of the parties. In the declaration it is stated that Halsted, the plaintiff, is a citizen of New York, but nothing is said of the citizenship of the defendants. Neither is there anything in the rest of the record to show what their citizenship actually was. For this reason the judgment is reversed, but, as the fault rests alone on the plaintiff, whose duty it was, in bringing the suit, to make the jurisdiction appear, the reversal will be at his cost in this court (*Hancock* v. *Holbrook*, 112 U. S., 229)."

In *Hanrick* v. *Hanrick* (decided April 30, 1894), 153 U. S., at page 198, the Court said:

"Brady having wrongfully removed the case into the Circuit Court, must pay the costs in that court

as well as the costs of the three appeals to this Court. *Mansfield, &c., Railway* v. *Swan*, 111 U. S., 379; *Torrence* v. *Shedd*, and *Tennessee* v. *Union & Planters' Bank*, above cited.

In *Tennessee* v. *Union and Planters' Bank*, 152 U. S., 454, the Court, at page 464, said:

"The costs in each case are to be borne by the party who brought into the Circuit Court of the United States a case not within its jurisdiction *Torrence* v. *Shedd*, 144 U. S., 527; *Martin* v. *Snyder*, 148 U. S., 663."

In *Neel* v. *Pennsylvania Company*, 157 U. S., 153, the record failed to show of what State plaintiff was a citizen.

The Chief Justice stated the case and said:

"On the authority of *Grace* v. *American Central Insurance Co.*, 109 U. S., 278, 283, 284; *Continental Insurance Co.* v. *Rhoads*, 119 U. S. 237, and *Mansfield, Coldwater and Lake Michigan Railway* v. *Swan*, 111 U. S., 379, 388, the judgment of the Circuit Court will be reversed, with instructions to remand the case to the state court, with costs against defendant in error, which must also pay the costs in this court. *Hanrick* v. *Hanrick*, 153 U. S., 192, 198."

Idem, p. 154.

Sixth Point.

It is respectfully submitted that the question certified should be answered in the negative, and should be so certified.

Dated April 18, 1904.

FRANKLIN BARTLETT,

Of Counsel for Plaintiff-in-Error.